LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 30 1967
JOHN F. DAVIS, CLERK

NO. 551

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

STATE OF TEXAS,
Petitioner

v.

CENTRAL POWER & LIGHT COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

CRAWFORD C. MARTIN
Attorney General of Texas

GEORGE M. COWDEN
First Assistant Attorney General

A. J. CARUBBI, JR.
Staff Legal Assistant

J. C. DAVIS
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General

Attorneys for Petitioner
Box R, Capitol Station
Austin, Texas 78711

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
HOW FEDERAL QUESTION IS PRESENTED	3
REASONS FOR GRANTING THE WRIT	6
IMPORTANCE OF QUESTION PRESENTED	10
CONCLUSION	11
CERTIFICATE OF SERVICE	12
APPENDIX A	13
APPENDIX B	31
APPENDIX C	35

AUTHORITIES

Cases:

Boswell's Lessee v. Otis, 9 How. 336 (1849) 9

Cavitt v. Amsler, 242 S.W. 246 (Tex.Civ.App. 1922, error dism.) 10

Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877) 6, 9

Phillips v. Perue, 111 Tex. 112, 229 S.W. 849 (1921) ... 10

State v. National Power & Light Co., 16 N.J. 486, 109 A.2d 607 (1954) 9

Sullivan v. Texas, 207 U.S. 416, 28 S.Ct. 215, 52 L.Ed. 274 (1907) 6

Texas v. New Jersey, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1965) 2, 3, 4, 5, 6, 7, 10, 11

Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71, 82 S.Ct. 199, 7 L.Ed.2d 139 (1961) 7, 10

AUTHORITIES—Continued

Case:	Page
Yeaman v. Galveston City Co., 106 Tex. 389, 167 S.W. 710 (1914)	10
United States Statutes:	
28 United States Code, § 1257	6
28 United States Code, § 1257(3)	2
Texas Statutes:	
Article 3272a, Texas Civil Statutes (Vernon, 1962 Supplement)	3
Other Statutes:	
§ 44-355, Arizona Revised Statutes (1956)	2, 8
§ 1504, California Code of Civil Procedure	2, 8
§ 3-59a, General Statutes of Connecticut	3, 8
§ 393.064, Kentucky Revised Statutes (1962)	3, 8
Chapter 141, § 107, Illinois Revised Statutes	3, 8
60 Oklahoma Statutes (Supplement, 1967) § 655	3, 8
Title 2A, Chapter 37-30, New Jersey Statutes	3, 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

NO. ———

STATE OF TEXAS,

Petitioner

v.

CENTRAL POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Attorney General of the State of Texas, on behalf of the State of Texas, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas, entered in the above case on September 29, 1966.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District entered September 29, 1966, (Record) is reported at 410 S.W.2d 18 and is printed in Appendix A of this petition. The findings of fact and conclusions of law of the district court (Record) are unreported and are printed in Appendix B of this petition.

JURISDICTION

The judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas was

entered on September 29, 1966, (Record). A timely motion for rehearing filed on October 12, 1966, (Record) was overruled on December 29, 1966, (Record). Petitioner's application for writ of error was filed in the Supreme Court of Texas on February 1, 1967, (Record), and the order of the Supreme Court of Texas refusing to grant said application for writ of error was entered on May 10, 1967, (Record). Petitioner's timely motion for rehearing of its application for writ of error was overruled by the Supreme Court of Texas on June 7, 1967, (Record). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., § 1257(3).

QUESTION PRESENTED

The respondent public utility, a corporation chartered under the laws of the State of Texas, does not transact business outside the State of Texas, nor has respondent been granted a certificate of authority to transact business in any state other than the State of Texas. The respondent corporation holds unclaimed dividends payable to record owners of its stock whose last known addresses, according to the corporate books and records, are in states other than the State of Texas. Under these circumstances:

Does the decision of this Court in *Texas v. New Jersey*, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1965) preclude the petitioner from escheating the unclaimed dividends of such domestic corporation when neither the corporation nor the unclaimed dividends are within the jurdisdiction of the states of last known address?

STATUTES INVOLVED

The statutory provisions involved are: § 44-355, Arizona Revised Statues (1956); § 1504, California Code

of Civil Procedure; § 3-59a, General Statutes of Connecticut; § 393.064, Kentucky Revised Statutes (1962); Chapter 141, § 107, Illinois Revised Statutes; 60 Oklahoma Statutes (Supplement, 1967) § 655; Title 2A, Chapter 37-30, New Jersey Statutes. They are printed in Appendix C.

STATEMENT OF THE CASE

This action originated on March 28, 1964, when petioner filed its plaintiff's original petition (Record), in the 94th District Court of Nueces County, Texas, asking that certain personal property held by respondent be declared escheated under the provisions of Article 3272a, Texas Civil Statutes (Vernon, 1962 Supplement). The property involved included unclaimed dividends held by the respondent corporation for certain of its shareholders whose last known addresses were, according to the corporate books and records, in states other than the State of Texas. It is undisputed that the respondent, a corporation chartered under the laws of the State of Texas, does not transact business outside the State of Texas nor does it hold a certificate of authority to transact business in any other state (Trial Court Finding of Fact No. 4, Record).

HOW FEDERAL QUESTION IS PRESENTED

The case was tried before the district court without a jury on October 5, 1964. That court had not rendered its decision or entered its judgment at the time of this Court's decision in *Texas v. New Jersey,* 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 on February 1, 1965. The respondent and petitioner, through their respective counsel, appeared before the district court on May 20, 1965, and presented oral argument relating to the effect of the decision in *Texas v. New Jersey* upon petition-

er's right to escheat the dividends held by respondent for shareholders whose last known addresses were in states other than Texas. Respondent argued that the decision of this Court foreclosed petitioner's right to escheat such dividends; petitioner argued that the decision in *Texas v. New Jersey* did not preclude the escheat of the dividends in question, because: (1) the decision did not apply to a situation where the state of last known address did not have personal jurisdiction over the holder of the property or the property itself; and, (2) even applying the rule laid down by this Court in that case, the escheat statutes of the states of last known address make it clear that they have no application to a holder not within their jurisdiction.

On September 10, 1965, the district court entered its judgment decreeing the escheat of personal property held by respondent, including the dividends held for persons with last known addresses in states other than Texas (Record). The district court's finding of fact No. 4 and conclusions of law Nos. 5, 6, and 7 supported the judgment of escheat of such dividends and showed that court's agreement with petitioner's contentions (Record). Such finding and conclusions read as follows:

> "4. I find that Central Power & Light Company is a corporation chartered under the laws of the State of Texas and that such company does not transact any business in any other state nor has it been granted permission to transact business in any other state.
>
> "5. I conclude that the laws of the states which are shown to be the states of last known address of persons for whom dividends payable on the 7%, 6%, and 4% Preferred Stock of Central Power & Light Company are held make no provision for the escheat of such dividends.

"6. I conclude that no other state has in personam jurisdiction of Central Power & Light Company and in the absence of such personal jurisdiction no other state has the power to escheat property held by Central Power & Light Company even though the last known address of the person entitled thereto may be within such other state.

"7. I conclude that personal jurisdiction over the holder of personal property is essential to the power of a state to escheat property under its laws."

The respondent's exception and notice of appeal were included in the judgment of the district court (Record). Respondent specifically excepted to the above quoted conclusions of the district court by means of its Defendant's Bill of Exception No. 1 which was duly approved by the district court (Record). The question was presented on appeal to the court of civil appeals by respondent's Second Point of Error before that court. (410 S.W.2d 18, 20).

The court of civil appeals, acting solely on the authority of this Court's decision in *Texas v. New Jersey,* held that the district court erred in its conclusion of law Nos. 5, 6, and 7 and rendered judgment decreeing that the dividends in question were not subject to escheat by the State of Texas (410 S.W.2d 18, 26-27). The petitioner duly preserved this question by its assignments of error Nos. XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, and XXXIII in its motion for rehearing which was timely filed in the court of civil appeals (Record) and subsequently overruled by that court (Record).

The question was presented to the Supreme Court of Texas by the petitioner's Point of Error No. 3 in its Application for Writ of Error to review the judg-

ment of the court of civil appeals (Record). The Supreme Court of Texas, by order entered on May 10, 1967, "having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused." (Record). Petitioner's motion for rehearing of its application for writ of error was overruled on June 7, 1967 (Record). The refusal of the Supreme Court of Texas to review the judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District made the judgment of the court of civil appeals final, and, it became the judgment of the highest state court in which a decision upon the question could be had. Thus, the judgment of the court of civil appeals is reviewable under 28 U.S.C. § 1257. *Sullivan v. Texas,* 207 U.S. 416, 28 S.Ct. 215, 52 L.Ed. 274 (1907).

REASONS FOR GRANTING THE WRIT

In holding that the petitioner was not entitled to escheat unclaimed dividends held by respondent for persons with last known addresses in other states, the court of civil appeals stated at 410 S.W.2d 18, 26: "The question here presented has been authoritatively settled by the Supreme Court of the United States in the case of The State of Texas v. State of New Jersey et al., 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1965)." Yet, upon the record presented, the decision of the court below actually conflicts with the decision of this Court in *Texas v. New Jersey,* and conflicts in principle with *Pennoyer v. Neff,* 95 U.S. 714, 24 L. Ed. 565 (1877) and the long line of decisions following that case.

The case of *Texas v. New Jersey,* supra, which was the sole basis for the action of the court below in deny-

ing the escheat of the dividends in question, involved a situation where several states were insisting that they had the right to escheat certain property held by Sun Oil Company. Each state claiming the property had personal jurisdiction over Sun Oil Company; each state of last known address of the owners of the property in question had personal jurisdiction over Sun Oil Company. Indeed, the record of that case shows that Sun Oil Company was registered to transact business in all of the continental states of the United States. (Finding of Fact XIV, Report of the Special Master, No. 13 Original, October Term, 1964). The fact that Sun Oil Company was subject to the jurisdiction of all states was at the heart of the whole matter: it was the basis for the controversy which this Court was called upon to resolve. Without this jurisdictional conflict the case would not have been there for decision. *Western Union Tel. Co. v. Pennsylvania,* 368 U.S. 71, 82 S.Ct. 199, 7 L.Ed.2d 139 (1961).

In the face of the conflicting claims which arose out of the jurisdiction of the states over Sun Oil Company, this Court, in order to establish some system of priority, formulated a rule which admittedly was not founded in the statutes, constitution, court decisions, or logic. *Texas v. New Jersey,* 379 U.S. 674, 683 (1965). That rule was stated at 379 U.S. 674, 681-682 as follows:

> "... each item of property in question in this case is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records."
>
> [BUT] ... "what is to be done with property owed persons (1) as to whom there is no record of any address at all, or (2) whose last known address is in a State which does not provide for escheat of the property owed them ... as to the

first situation . . . the property [would] be subject to escheat by the State of corporate domicile, provided that another State could later escheat upon proof that the last known address of the creditor was within its borders . . . [in] the second situation mentioned above . . . the State of corporate domicile could escheat the property subject to the right of the State of the last known address to recover it if and when its law made provision for escheat of such property."

In the case at bar, the trial court looked to the statutes of the states of last known address involved and correctly concluded that they made no provision for the escheat of the dividends involved (Conclusion of Law No. 5), and, in accordance with the rule of this Court, awarded the dividends to petitioner as the state of respondent's corporate domicile. The error of the court below in setting aside the trial court's conclusion and judgment is demonstrated by resort to the statutes involved.

The states of last known address of the shareholders entitled to the dividends in question are: Arizona, Arkansas, California, Connecticut, Illinois, Kentucky, New Jersey, Oklahoma, and Rhode Island.

Arizona, California, Connecticut, Kentucky, Illinois, and Oklahoma have enacted the Uniform Disposition of Unclaimed Property Act or parts thereof. Each has adopted Section 5 of the Uniform Act. § 44-355, Arizona Revised Statutes (1956); § 1504, California Code of Civil Procedure; § 3-59a, General Statutes of Connecticut; § 393.064, Kentucky Revised Statutes (1962); Chapter 141, § 107, Illinois Revised Statutes; 60 Oklahoma Statutes (Supplement, 1967) § 655. The relevant statutory provision of each of these states is set forth at length in Appendix C. Each of these stat-

utes make it clear that corporate dividends are not subject to escheat in those states unless: (1) such dividends are held or owing by a business association organized under the laws of or created in such state; or (2) the dividends are held or owing by a business association doing business in such state, but not organized under the laws of or created in such state.

Although New Jersey has not adopted the Uniform Disposition of Unclaimed Property Act, Title 2A, Chapter 37-30, New Jersey Statutes, which is set forth at length in Appendix C, makes it clear that dividends are not subject to escheat by New Jersey unless they are held by a domestic corporation or a foreign corporation authorized to do business in New Jersey. *State v. National Power & Light Co.*, 16 N.J. 486, 109 A.2d 607 (1954).

The statutes of the states of Arkansas and Rhode Island do not have the express jurisdictional requirements set out in the statutes of the other states of last known address. However, the trial court, by its conclusions of law No. 6 and No. 7, determined that the laws of those states could not dictate the disposition of the property in question because the respondent was not subject to the jurisdiction of such states. The conclusion of the trial court in this respect is in accord with the decisions of this Court in *Boswell's Lessee v. Otis*, 9 How. 336 (1849); *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877) and many decisions following those cases. The judgment of the court below in setting aside the conclusions of the trial court relating to the essential of jurisdiction is in conflict with the principles of those decisions of this Court.

Under the decisions of the courts of the State of Texas, the declared but undistributed dividends of a

domestic corporation are not intangible property, but, to the contrary constitute a trust fund held by the corporation for its shareholders. *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S.W. 710 (1914); *Cavitt v. Amsler*, 242 S.W. 246 (Tex.Civ.App. 1922, error dism.); cf. *Phillips v. Perue*, 111 Tex. 112, 229 S.W. 849 (1921). The dividends in question thus constitute a res having an exclusive situs within the State of Texas. Since the declared but undistributed dividends are not an intangible under Texas law, the decision of the court below further conflicts with the following pronouncement of this Court in *Texas v. New Jersey*, 379 U.S. 674, 677, 85 S.Ct. 626, 13 L.Ed.2d 596, 599 (1965):

> "With respect to tangible property, real or personal, it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat."

IMPORTANCE OF QUESTION PRESENTED

The importance of the question presented cannot be overemphasized. It concerns the application of a rule pronounced by this Court in a case over which this Court had exclusive and original jurisdiction. That rule was announced in *Texas v. New Jersey*, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596 (1965), a case which was presented to this Court pursuant to the invitation expressed in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 82 S.Ct. 199, 7 L.Ed.2d 139 (1961). While it cannot strictly be said that the question presented arises under the constitution or laws of the United States, it does so arise because it involves the application of a rule which was pronounced by this Court in a case which was committed to it exclusively by the constitution and laws of the United States. There can be no more important goal for this Court

than to assure that the rule announced in *Texas v. New Jersey* be applied to the facts presented by this record in a manner which will be uniform throughout the various states. The divergent views of the trial court and the court of civil appeals with regard to the application of the rule to the facts before them only highlights the necessity that this Court, as the sole and final arbiter of the application of that rule, grant certiorari and resolve the question here presented.

CONCLUSION

For the reasons stated above, the decision of the court of civil appeals raises a question of general importance to the application of the rule announced by this Court in *Texas v. New Jersey*. Certiorari should be granted in order that an authoritative determination of the correctness of the application of the rule by the court below may be secured.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas
GEORGE M. COWDEN
First Assistant Attorney General
A. J. CARUBBI, JR.
Staff Legal Assistant
J. C. DAVIS
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General
BROCK JONES
Assistant Attorney General
Attorneys for Petitioner
Box R, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, W. O. Shultz II, one of the attorneys for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ------day of ----------, 1967, I served a copy of the foregoing Petition for Writ of Certiorari on the respondent Central Power & Light Company by depositing a copy in the United States Mail as certified mail with postage prepaid and addressed to the attorney of record for said respondent, as follows: Philip McConnell, c/o Central Power & Light Company, 120 N. Chaparral Street, Corpus Christi, Texas.

W. O. SHULTZ II
Assistant Attorney General of Texas

APPENDIX A

NUMBER 202

IN THE COURT OF CIVIL APPEALS
FOR THE THIRTEENTH SUPREME
JUDICIAL DISTRICT OF TEXAS
SITTING AT CORPUS CHRISTI, TEXAS

CENTRAL POWER AND LIGHT COMPANY,
Appellant,

v.

STATE OF TEXAS,
Appellee.

On appeal from the 94th District Court of
Nueces County, Texas.

OPINION

This suit was brought by the State of Texas, appellee, upon the relation of its State Treasurer, to escheat certain personal property held by Central Power and Light Company, appellant, under the provisions of Article 3272a, V.A.C.S. Five categories of property were originally involved in the trial court, i.e., (1) unclaimed dividends and funds for redemption of stock, (2) unclaimed customer's service deposits and interest thereon, (3) unclaimed funds for the redemption of bonds, (4) unused and unclaimed deductions from employees salaries for the purchase of United States Savings Bonds, and (5) unclaimed wages. All of these funds had been unclaimed for seven years prior to filing of the instant suit, and were alleged to be abandoned.

In a non-jury trial, judgment was rendered ordering escheat as to the first four above-mentioned categories, but denying it as to the fifth, concerning unclaimed wages, on the basis that such claims were barred by limitation. At the request of appellant, the trial court made and filed findings of fact and conclusions of law, which will be more fully discussed in the course of the opinion.

Appellant urges two points of error, as follows:

FIRST POINT

The error of the Trial Court in finding and adjudging that the customers' service deposits and accrued interest thereon constituted a pledge or bailment and the relationship of debtor-creditor between the Appellant and the customers was not created and that limitations had not run against the former customers' rights or claims thereto; hence, the State was entitled to escheat such claims and enforce them against Appellant.

SECOND POINT

The error of the Trial Court in adjudging the escheat by the State of Texas of claims to funds of debts in favor of claimants or creditors whose last known addresses were, according to Appellant's books and records, in other states than Texas with laws providing for the escheat of such claims to funds and debts.

On this appeal only unclaimed customer service deposits are involved under point one, and unpaid dividends on preferred stock under point two.

Hereafter, appellant will sometimes be referred to as the "Company" and the parties who contracted with it for service as the "Customer" or "owner of the deposit."

The basic facts relating to point one will be briefly stated. Appellant is a public utility corporation, incorporated under the laws of Texas, engaged in the business of generating and selling electric power and energy. Over a period of some forty years, ending in 1957, covered by the State's suit, approximately 29,000 former customers of appellant failed to claim service deposits and accrued interest thereon totaling $76,904.49 upon discontinuing electric service from appellant. Each of these unclaimed deposits with any accrued interest thereon was reported to the State Treasurer in accordance with the requirements of Article 3272a, V.A.C.S. The originals of these reports were introduced in evidence in the trial court as Plaintiff's Exhibit No. 1 and have been forwarded to and are part of the record in this Court. Representative or specimen forms of receipts and certificates issued to customers in connection with these deposits are also in the record. The customers making the deposits discontinued taking electric service more than seven years before the institution of this suit by the State. Beginning in the year 1936, all inactive customers deposits held by appellant for five years after discontinuance of service have been transferred to nonoperating income and, accordingly, were included in income for payment of federal income taxes. This practice was followed through the calendar year 1960.

With reference to customers service deposits the trial court made findings of fact as follows:

> "1. I find that the funds involved in this suit which are designated as 'inactive customer deposits' were deposited with Central Power & Light Company by the persons listed in Exhibit C of Plaintiff's Exhibit No. 1 as a condition precedent to the furnishing of electrical service to such persons by Central Power & Light Company.

"2. I find that Central Power & Light Company acknowledged by the receipts issued that such deposits were security for the payment of any and all indebtedness for services rendered by Central Power & Light Company to the depositor.

"3. I find that, subsequent to the dates Central Power & Light Company filed its reports of property subject to escheat and prior to the time this action was filed, such company either refunded or credited on existing accounts 1733 'inactive customer deposits' listed in Exhibit C of Plaintiff's Exhibit No. 1 totaling $8850.96 upon demand and without protest that the statutes of limitation barred the recovery of such deposits."

Also concerning customers service deposits, the trial court filed conclusions of law as follows:

"1. I conclude that the deposits of money held by Central Power & Light Company as 'inactive customer deposits' are held in a fiduciary capacity pursuant to a type of bailment known as a pledge.

"2. I conclude that the periods of limitation provided by the statutes of this State have never commenced to run and the causes of action of those persons listed in Exhibit C of Plaintiff's Exhibit No. 1 for the return of their deposits have not been barred by such statutes of limitation.

"3. I conclude that Article 1440 of Vernon's Civil Statutes imposes upon Central Power & Light Company an absolute duty to return the 'inactive customer deposits' in question and that the limitation statutes of this State cannot relieve the Company of such duty or bar an action to compel the performance thereof.

"4. I conclude that the plea of limitations asserted by Central Power & Light Company has as its sole purpose the circumvention and avoidance of the provisions of Article 3272a of Vernon's

Civil Statutes and is not intended to preclude the right of the persons making such deposits to have them returned."

Under its first point, appellant's basic argument is that the unclaimed customers service deposits and accrued interest thereon were barred by the two and/or four-year statutes of limitation, and that the State can escheat no greater right than the former owners or claimants had, which amounts to no more than an unenforcible claim against appellant. Appellant further specifically contends that the customers service deposits created only simple debts arising out of a creditor-debtor relationship which were barred by limitation when this suit was filed. Appellee contends that the trial court correctly concluded that they were pledges or bailments and that limitations would not begin to run in the absence of a showing that repudiation of the pledges had been communicated to the pledgeors; therefore, that the claims were enforcible against appellant.

In Southern Pacific Transport Company v. The State of Texas, 380 S.W. 2d 123 (Tex.Civ.App., 1964, writ refused), it was held that statutes of limitation can be plead against the State of Texas to bar enforcement of stale claims which are escheated under Article 3272a, V.A.C.S.; that when the right to plead limitations vests in a defendant, it cannot be constitutionally divested by the State; that the State can escheat no greater right to enforce the claim than was held by the former owner; that after limitations had run, whatever claim the State escheated was unenforcible; and that, although the State could recover judgment escheating the claims, a judgment enforcing payment of the same was improper.

The exact question as to whether claims to customers

service deposits of the type involved here are subject to the running of the statutes of limitation has not been passed upon by Texas appellate courts.

Appellant relies in part upon cases from other jurisdictions holding that the relationship between the claimant and the holder of the deposit is that of debtor-creditor; and that limitations will bar enforcement of the claim. See State of New Jersey v. Atlantic City Electric Company, 23 N.J. 259, 128 A.2d 861 (Sup.Ct. New Jersey, 1956); State of New Jersey v. Plainfield-Union Water Company, et al, 183 A2d 684 (Superior Court of New Jersey, Appellate Division, 1962); Commonwealth v. Kentucky Power & Light Company, 257 Ky. 66, 77 S.W.2d 395 (Court of Appeals, Kentucky, 1934). The New Jersey escheat cases in determining the contractual intent of the parties place emphasis upon the factors that the customers service deposit was made and accepted without restriction as to use and without objection to commingling it with the general funds of the company; and that the company obligated itself to pay interest at a fixed rate per annum. The relationship between the company and customer was there held to be that of debtor and creditor. The only case cited to us holding to the contrary, and strongly relied upon by appellee, is Brooklyn Borough Gas Co. v. Bennett, 277 N.Y.S. 203, 135 Misc. 106 (Sup.Ct. N.Y. 1935), a trial court decision.

The subject of utility customer service deposits has been dealt with in two Texas Statutes: Article 1440, V.A.C.S., and Article 1054, V.A.P.C. From 1923 until amended in 1963 those statutes read as follows:

"Art. 1440. Deposits for installing service

"Every person, firm, company, corporation, receiver or trustee engaged in the furnishing of wa-

ter, light, gas or telephone service which requires the payment on the part of the user of such service a deposit of money as a condition precedent to furnishing the same, shall pay six percent interest per annum on such deposit to the one making same, or to his heirs or assigns, from the time of such deposit, the same to be paid on the first day of January of each year or sooner if such service be discontinued. When such service is discontinued, such deposit, together with any unpaid interest thereon, or such part of such deposit and unpaid interest, not consumed in bills due for such service, shall be returned to such depositor, his heirs or legal representatives. Acts 2nd C.S. 1923, p. 101."

"Art. 1054. Deposit for installing service

"Every person, firm, company, corporation, receiver or trustee engaged in the furnishing of water, light, gas or telephone service which requires the payment on the part of the user of such service a deposit of money as a condition precedent to furnishing any such service, shall pay six per cent interest per annum on such deposit to the one making same, or to his heirs or assigns, from the time of such deposit, the same to be paid on the first day of January of each year, or sooner if such service be discontinued. When such service is discontinued, such deposit, together with any unpaid interest thereon, or such part of such deposit and unpaid interest not consumed in bills due for such service, shall be returned to such depositor, his heirs or legal representatives. Whoever violates any provision of this article shall be fined not less than twenty-five nor more than two hundred dollars, or be confined in jail not less than six months nor more than one year, or both. Acts 2nd C.S. 1923, p. 101."

The said statutes were amended by Acts 1963, 58th Legislature p. 50, ch. 32, Section 1 (Art. 1440, V.A.C.S.) and 2 (Art. 1054, V.A.P.C.) so as to pro-

vide that interest on deposits would be payable annually on demand, instead of on the first day of January of each year, but such amendments are not material to disposition of the instant suit.

A review of analogous Texas cases leads us to the view that the majority rule concerning customers service deposits, particularly as announced in the persuasive New Jersey decisions, should be followed by us. The case of Brooklyn Borough Gas Co. v. Bennett, supra, appears to be distinguishable on several grounds, particularly because of the differences in the Statutes of New York there involved and the pertinent Texas Statutes.

The basic relationship between the company and the customer here is that of supplier and user; and a customer's service deposit was required by the contract which created that relationship, as security for payment of the user's bill. Although the three different forms of receipts or certificates appear in the record, they all provide in substance that when service is discontinued the company will refund or return the deposit together with unpaid interest thereon less any amounts due it. The provisions of the above-mentioned statutes concerning return of the customer's service deposit are substantially the same as contained in the agreement of the parties. In any event, the statutory provisions would be incorporated into the contract between the parties. Winder Bros. v. Sterling, 118 Tex. 268, 12 S.W.2d 127 (1929).

The contract thus provides for the time and manner for discharging the company's obligation concerning the deposit. The time is upon discontinuance of service and settlement of the account. The manner of determining the amount is that the customer's bill, if

any, may be deducted from the deposit; and if there is no bill, the full amount of the deposit is to be returned to the customer.

When service is discontinued the relationship of supplier and user ceases to exist. When the amount of the customer's bill is ascertained the sum of money owned by the company is then settled. The deposit, or balance of it, is no longer security held for payment of a debt owing by the customer. Collection by the customer is all that remains to terminate the transaction. He has a right to collect and the company has an obligation to pay, both of which are fixed by the contract.

There is nothing in the contract between the parties which shows an intent that the company would hold the deposit indefinitely after the relationship of supplier and user is terminated. On the other hand, the intent shown is that the customer would have a matured right to a refund of an amount of money equivalent to the deposit, or the balance of it, after discontinuance of service and settlement of the account. Under these conditions, the obligation of the company is nothing more than to pay a simple debt.

We therefore hold that the legal relationship between the company and its customers established in this case was that of debtor and creditor; and that the statutes of limitation can be properly asserted by the company, if it so elects, as a defense to the claim of the owner of the deposit. Limitations will begin to run on the owner's claim for return of the deposit when service is discontinued plus a reasonable time for the ascertainment of the amount of the customer's bill and the balance owed by the company.

The trial court erred in concluding that the company held that customers service deposits in a fiduciary ca-

pacity pursuant to a type of bailment known as a pledge; that the customers claims were not barred by limitation; that Art. 1440, V.A.C.S., imposes an absolute duty upon the company to return such deposits, of which it cannot be relieved by the statutes of limitation; and that the company's plea of limitations was for the sole purpose of avoiding the provisions of Art. 3272a, V.A.C.S., and, therefore, ineffective.

In addition to our holding that the contracts in question show an intent to create the relationship of debtor and creditor, it is further apparent that the customer's service deposits are not attended by the legal characteristics of pledges and that the parties do not have the remedies of pledgeor and pledgee.

It appears here that title to the specific money deposited by the customer passed to the company upon its delivery. Story v. Palmer, 284 S.W.331 (Tex.Civ. App. 1926, n.w.h.). The money so deposited was not segregated to preserve its separate identity, but was commingled with the general funds of the company. Upon discontinuance of service and settlement of the account, the owner of the deposit, or the balance of it, had a claim, not to specific money, but to an amount of money owed by the company. Thus, the essential element of a pledge, that the pledgeor retain title to the property pledged is lacking. See First Nat. Bank of Wichita Falls v. McCamey, 130 Tex. 149, 105 S.W.2d 879 (1937).

It further appears that the company did not have a lien on the money actually deposited, because its specific identity was lost. Instead, the company originally acquired title to the money, and after it was commingled with other funds had a contract right to apply the amount held by it to the customer's bill. Foreclosure

on specific money was impossible, and as to an amount of money was unnecessary. It thus appears that another essential element of a pledge, that the pledge have a lien on property and consequent right to enforce it, is also lacking. First Nat. Bank of Wichita Falls v. McCamey, supra.

It is also the rule that where a valid pledgeor-pledgee relationship exists originally and the pledgeor's debt is satisfied, the pledgee is legally obligated to return the property pledged to the pledgeor. If the pledgee fails to perform such obligation the pledgeor may elect to recover the property itself, or to sue for damages for breach of contract of the pledgee's obligation to return it, or to recover the proceeds in case it has been sold. See 46 Tex. Jur. 2d, Pledges and Collateral Security, Sec. 18, p. 212. In this case the company could not return the specific money, but could return only an amount of money owing to the customer upon discontinuance of service and settlement of the account. The customer's cause of action, therefore, could not be for return of the specific property pledged; neither could it be for conversion of specific property, since it appears that title to the money had long since passed to the company under the agreement of the parties. The remedy of the customer would simply be that of a creditor for recovery of a debt against which statutes of limitation will operate.

There is authority for the proposition that where money, as distinguished from other personal property, is deposited to secure payment of an account, the deposit is not a pledge, but is the subject of a creditor-debtor relationship. See Wilcox v. Gauntlett, 166 N.W. 856, 200 Mich. 272 (Sup.Ct.Mich. 1918); Commercial National Bank v. Cutter Realty Company, 170 S.E.

139, 205 N.C. 99 (Sup.Ct.N.C., 1933). There are several Texas cases dealing with money deposits as security for payment or performance of lease contracts, in none of which are the deposits treated as pledges. See Smith v. J. Weingarten, Inc., 120 S.W. 2d 878 (Tex.Civ.App., 1938, wr.dism.); Fry v. Spencer, 141 S.W.2d 730 (Tex.Civ.App., 1940, n.w.h.); Hill and Hill Truckline, Inc., v. Powell, 319 S.W.2d 128 (Tex. Civ.App., 1958, n.w.h.).

Although we are convinced that only a relationship of creditor-debtor is here involved, it is also apparent that even if a pledgeor-pledgee relationship originally existed, the claims in question are nevertheless subject to a defense of limitations. Here the owner of a customers service deposit had a claim for the return of the deposit, or balance of it, upon discontinuance of service and settlement of the account. The amount of the company's liability was then fixed and only collection by the owner remained. The case therefore is subject to the rule that if the only act necessary to perfect a plaintiff's cause of action is one to be performed by him, and he is not under legal disability, that he cannot indefinitely suspend the running of limitations by delaying performance of the act. See Jackson v. Tom Green County, 208 S.W. 2d 115 (Tex.Civ.App. 1949, wr.ref.n.r.e.). If demand was an integral part of the customer's cause of action for return of the deposit, it is true that limitation would not run unless waived or unreasonably delayed; however, it has been held that in the absence of mitigating circumstances, a time coincident with the running of the statute of limitations will be deemed reasonable, and if demand is not made within that period, the action will be barred. Cook's Adm'r v. Cook, 19 Tex. 434 (1857); Foreman v. Graham, 363 S.W.2d 371 (Tex.

Civ.App. 1962, n.w.h.); Aetna Casualty and Surety Co. v. State, 86 S.W.2d 826 (Tex.Civ.App. 1935, wr. ref.). In this case every claim for refund of deposit was more than seven years old when this suit was filed. There is no showing of disability or other reason on the part of customers or owners of the claim which would prevent making of demand. It thus appears that if demand was necessary, it has been unreasonably delayed, and the four year statute of limitation is available as a defense.

We now pass to a discussion of the trial court's conclusions of law numbers 3 and 4, which hold in substance that Art. 1440, V.A.C.S., imposes an absolute duty on the company to return the customer's service deposits not subject to relief under statutes of limitation, and that the sole purpose of the pleas of limitation here was to circumvent the provisions of Art. 3272a, V.A.C.S. Appellee argues that in enacting Articles 1440, V.A.C.S., and 1054, V.A.P.C., the legislature intended that the relationship between utilities and their customers concerning deposits be something other than debtor-creditor; that there was thereby created an absolute duty to return the deposit not subject to operation of statutes of limitation. The trial court agreed with these contentions in its conclusions of law. Appellant contends that the trial court erred in so concluding and that the statutes of limitation are fully applicable to the customer's service deposits. Appellant particularly says that the legislative history of Art. 3272a, V.A.C.S., supports its position and, further, that the courts will not imply exceptions to the operation of statutes of limitation in order to circumvent a defensive plea based upon the same. We agree with appellant.

At its First Called Session in 1961 the Texas Legislature passed H.B. 5, 57th Legislature, p. 49, Ch. 21, now codified as Article 3272a, V.A.C.S., which statute is completely silent on the subject of limitations in escheat cases. Appellant points to the fact that at the same session, H.B. 182 was rejected by the Texas House of Representatives. Sec. 16 of that bill reads as follows:

> "The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by this act or to pay or deliver abandoned property to the State Treasurer."

Appellant further calls attention to the fact that at the Regular Session of the 59th Legislature in 1965, H. B. 117 was introduced for the purpose of amending the original 1961 act, now Art. 3272a, V.A.C.S. Section 16 of that bill, as originally introduced, contained a provision that periods of limitation would not be a bar to the escheat of abandoned property. That section was deleted by the House Committee on Revenue and Taxation. As finally passed H. B. 117, Acts of 1965, 59th Legislature, p. 1230, Ch. 565, amending Art. 3272a, V. A.C.S., remained silent on limitations in escheat cases.

It is apparent that if the legislature had intended that statutes of limitation would not be available as a defense in escheats of "security deposits, unclaimed refunds and deposits for utility and other services" provided for in Articles 1440, V.A.C.S., and 1054, V.A.P. C., that the above-mentioned provisions would not have been omitted or deleted from the final act. Our conclusion on this point is in accord with the statement in

Southern Pacific Transport Company v. State, supra, wherein the court at 380 S.W.2d 127, 128, said:

> "There is no express provision in the laws of Texas which abrogates appellant's right to plead limitation as against enforcement of claims which are barred before escheated, nor is there any implied exception of which we are aware."
>
> . . . . . .
>
> "In Continental Supply Company v. Hutchins, Tex. Civ. App., 267 S.W.2d 914, error ref., the court said: 'Statutes of limitation are now generally regarded with favor by the courts, are to be construed as other statutes, and their application is not to be evaded by implied exceptions.' "

Appellee also argues, in accordance with finding of fact No. 3 of the trial court that appellant, subsequent to filing its report, had made refunds or credits on 1733 accounts designated "inactive customer deposits" amounting to $8,850.96, without protest or insistence upon limitations, that such deposits were admitted to be pledges. This position is not well taken. Appellant's waiver of the bar of limitations in some instances was permissible at its election and would not affect other claims which are subject to the defense of limitation. In any event, such waiver would not transform a debt into a pledge. To sustain appellee's position on this point, we would necessarily be engrafting an additional exception to the operation of statutes of limitation, which is not permissible. Southern Pacific Co. v. State, supra; Continental Supply Co. v. Hutchins, supra.

For the reasons stated, appellant's point one is sustained as to lack of enforcibility of payment of the claims involving customer's service deposits which are barred in any event by the four year statute of limitations.

Appellant's point two must also be sustained. The trial court erred in holding that the State of Texas was entitled to escheat certain claims in favor of various small creditors for dividends on preferred stock in the amount of $462.06 where appellant's records and reports reflected that such unclaimed dividends were in the names of persons or claimants whose last known addresses were in nine other States having laws providing for escheat of such claims and funds. The record reflects that such laws were brought to the attention of the trial court.

The question here presented has been authoritatively settled by the decision of the Supreme Court of the United States in the case of The State of Texas v. The State of New Jersey et al, 379 U.S. 674, 85 S.Ct. 626 (1965). There it was held that claims for debts or funds involving intangible personal property had their situs with the creditor, and that the State in which he is shown to reside, as reflected by the debtor's books, if it has an applicable escheat law, is the only State entitled to effect such escheat. That rule is applicable here to the extent that appellant is indebted for unclaimed dividends on preferred stock to the creditors who reside in other States having escheat laws. The State of Texas is not entitled to escheat the same.

The trial court erred in holding by its conclusions of law 5, 6 and 7, that such nine other States, in the absence of jurisdiction in personam over appellant did not have the power to escheat the claims or property held by it, even though the last known address of the person entitled thereto was in such other States.

We are, therefore, of the opinion that as to customer's service deposits involved under point one, the judgment escheating such claims should be affirmed,

but that portion ordering appellant to pay the amount of such escheated claims should be reversed and rendered in favor of appellant; and that as to the dividends on preferred stock involved under point two, the judgment should be reversed and here rendered that such claims and funds are not subject to escheat by appellee. The judgment is otherwise affirmed.

Affirmed in part and reversed and rendered in part.

T. GILBERT SHARPE
Associate Justice

Delivered and filed this 29th
day of September, 1966.

APPENDIX B

NO. 82136-C

IN THE DISTRICT COURT OF NUECES COUNTY, TEXAS
94TH JUDICIAL DISTRICT

STATE OF TEXAS

v.

CENTRAL POWER & LIGHT COMPANY, ET AL.

(Filed: Oct. 16, 1965)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In compliance with the request of Defendant, Central Power & Light Company, filed pursuant to Rule 296, Texas Rules of Civil Procedure, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. I find that the funds involved in this suit which are designated as "inactive customer deposits" were deposited with Central Power & Light Company by the persons listed in Exhibit C of Plaintiff's Exhibit No. 1 as a condition precedent to the furnishing of electrical service to such persons by Central Power & Light Company.

2. I find that Central Power & Light Company acknowledged by the receipts issued that such deposits were security for the payment of any and all indebtedness for services rendered by Central Power & Light Company to the depositor.

3. I find that, subsequent to the dates Central Power & Light Company filed its reports of property subject to escheat and prior to the time this action was filed,

such company either refunded or credited on existing accounts 1733 "inactive customer deposits" listed in Exhibit C of Plaintiff's Exhibit No. 1 totaling $8,850.96 upon demand and without protest that the statutes of limitation barred the recovery of such deposits.

4. I find that Central Power & Light Company is a corporation chartered under the laws of the State of Texas and that such company does not transact any business in any other state nor has it been granted permission to transact business in any other state.

5. I find that some of the unclaimed dividends payable on the 7%, 6% and 4% Preferred Stock of Central Power & Light Company are held for persons whose last known addresses, according to the books and records of the company, were in states other than Texas.

CONCLUSIONS OF LAW

1. I conclude that the deposits of money held by Central Power & Light Company as "inactive customer deposits" are held in a fiduciary capacity pursuant to a type of bailment known as a pledge.

2. I conclude that the periods of limitation provided by the statutes of this State have never commenced to run and the causes of action of those persons listed in Exhibit C of Plaintiff's Exhibit No. 1 for the return of their deposits have not been barred by such statutes of limitation.

3. I conclude that Article 1440 of Vernon's Civil Statutes imposes upon Central Power & Light Company an absolute duty to return the "inactive customer deposits" in question and that the limitation statutes of this State cannot relieve the Company of such duty or bar an action to compel the performance thereof.

4. I conclude that the plea of limitations asserted by Central Power & Light Company has as its sole purpose the circumvention and avoidance of the provisions of Article 3272a of Vernon's Civil Statutes and is not intended to preclude the right of the persons making such deposits to have them returned.

5. I conclude that the laws of the states which are shown to be the states of last known address of persons for whom dividends payable on the 7%, 6% and 4% Preferred Stock of Central Power & Light Company are held make no provision for the escheat of such dividends.

6. I conclude that no other state has in personam jurisdiction of Central Power & Light Company and in the absence of such personal jurisdiction no other state has the power to escheat property held by Central Power & Light Company even though the last known address of the person entitled thereto may be within such other state.

7. I conclude that personal jurisdiction over the holder of personal property is essential to the power of a state to escheat such property under its laws.

SIGNED this 16th day of October, 1965.

TILLMAN SMITH
Judge Presiding

Endorsed: No. 82136-C State of Texas v. Central Power & Light Company, et al. In the District Court of Nueces County, Texas 94th Judicial District. Findings of Fact and Conclusions of Law. Filed Oct. 16, 1965. Ben A. Ligon, Clerk District Court, Nueces County, Texas. By Carolyn Taylor Deputy.

APPENDIX C

ARIZONA REVISED STATUTES (1956)

§ 44-355. Undistributed dividends and distributions of business associations

Any stock certificate or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum for which a negotiable instrument has not been issued and delivered in payment held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within seven years after the date prescribed for payment or delivery, is presumed abandoned if:

1. It is held or owing by a business association organized under the laws of or created in this state; or,

2. It is held or owing by a business association doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state. Added Laws 1956, Ch. 126, § 1.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 1504. Undistributed dividends and distributions of business associations

(a) Any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to its shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within seven years

after the date prescribed for payment or delivery, is presumed abandoned if:

(1) It is held or owing by a business association organized under the laws of or created in this State; or

(2) It is held or owing by a business association doing business in this State, including a national banking association, but not organized under the laws of or created in this State, and the records of the business association indicate that the last known address of the person entitled thereto is in this State.

(b) Any intangible interest in a business association, as evidenced by the stock records or membership records of the association, owned by a person who has not claimed a dividend presumed abandoned under paragraph (a) of this section, and who has not corresponded in writing with the business association concerning such interest for 15 years following the time such dividend was presumed abandoned, is presumed abandoned if:

(1) The business association was organized under the laws of or created in this State; or

(2) The business association is doing business in this State, including a national banking association, but was not organized under the laws of or created in this State, and the records of the business association indicate that the last known address of the person entitled to such interest is in this State.

For the purposes of this chapter the business association with respect to such interest shall be deemed a holder.

(c) Any dividends or other distributions held for or owing to a person at the time the stock or other se-

curity to which they attach became presumptively abandoned are also presumed abandoned as of the same time. (Added Stats. 1959, c. 1809, p. 4299, § 2, as amended Stats. 1961, c. 1904, p. 4012, § 2.)

GENERAL STATUTES OF CONNECTICUT

Sec. 3-59a. Property held by business association presumed abandoned, when. Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder or other security holder, or a participating patron of a cooperative, who has not claimed it or corresponded in writing with the business association concerning it within ten years after the date prescribed for payment or delivery, is presumed abandoned if: (1) It is held or owing by a business association organized under the laws of or created in this state; or (2) it is held or owing by a business association doing business in this state but not organized under the laws of or created in this state, and the records of the business association indicate that the last-known address of the person entitled thereto is in this state. (1961, P.A. 540, S. 4.)

ILLINOIS REVISED STATUTES, CHAPTER 141

§ 107. Property held in fiduciary capacity—Presumption of abandonment

All intangible personal property and any income or increment thereon, held in fiduciary capacity (other than as trustee of an active express trust) for the benefit of another person is presumed abandoned unless the owner has, within 15 years after it becomes payable or distributable, increased or decreased the principal,

accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary;

(a) If the property is held by a banking organization or a financial organization, or by a business association organized under the laws of or created in this State; or

(b) If it is held by a business association, doing business in this State, but not organized under the laws of or created in this State, and the records of the business association indicate that the last known address of the person entitled thereto is in this State; or

(c) If it is held in this State by any other person. 1961, Aug. 17, Laws 1961, p. 3426, § 7.

KENTUCKY REVISED STATUTES (1962)

393.064. Presumption of abandonment of stock or dividend of business association. Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within seven years after the date prescribed for payment or delivery, is presumed abandoned if:

(1) It is held or owing by a business association organized under the laws of or created in this state; or

(2) It is held or owing by a business association doing business in this state, but not organized under the laws of or created in this state, and the records of the

business association indicate that the last known address of the person entitled thereto is in this state. (1960, c. 142, § 3; effective June 16, 1960)

TITLE 2A, NEW JERSEY STATUTES

2A:37-30. When alternate method is available; summary action. Whenever a corporation organized under the laws of this state shall have custody or possession of, or shall have deposited with or given to an agent or trustee residing within or without the state custody or possession of, any moneys which are or shall be payable to any person as a dividend upon the capital stock, preferred or common, of the corporation, or as interest payable upon the corporation's bonds, indentures, notes or other formal instruments evidencing the indebtedness of the corporation, or any moneys payable as wages from the corporation to any person, and whenever any person or any corporation organized under the laws of any other state and authorized to do business in this state shall have custody or possession of any moneys payable by such person or corporation to any person as wages earned within this state, or of any moneys otherwise having a situs within this state, which moneys are payable to any one person in any of the categories above enumerated and the owner of, beneficial owner of, or person entitled to the same has been and remains unknown for the period of 5 successive years, or the whereabouts of such person has been and remains unknown for the period of 5 successive years, or such personal property has been and remains unclaimed for the period of 5 successive years, then the superior court may in a summary action brought in the name of the state of New Jersey by the attorney general or such attorney-at-law as he may designate, direct the corporation or other person

aforesaid to deliver such moneys to the state treasurer for safekeeping.

60 OKLAHOMA STATUTES (SUPPLEMENT, 1967)

SECTION 655. Undistributed dividends and distributions of business associations

Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member bondholder, or other security holder or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with a business association concerning it, within fourteen (14) years after the date prescribed for payment or delivery, is presumed abandoned if:

(a) It is held or owing by a business association organized under the laws of or created in this State; or

(b) It is held or owing by a business association doing business in this State, but not organized under the laws of or created in this State, and the records of the business association indicate that the last known address of the person entitled thereto is in this State.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 28 1967
JOHN F. DAVIS, CLERK

No. 551

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

STATE OF TEXAS,

Petitioner

v.

CENTRAL POWER AND LIGHT COMPANY,

Respondent

H. K. HOWARD
PHILLIP MCCONNELL

Attorneys for Respondent
120 N. Chaparral St.
Corpus Christi, Texas
78403

INDEX

	Page
RESTATEMENT OF QUESTION PRESENTED	1
RESTATEMENT OF THE CASE	2
ARGUMENT AND AUTHORITIES	3
CONCLUSION	9
CERTIFICATE OF SERVICE	9

AUTHORITIES

Central Power and Light Company v. State of Texas; 410 S.W. 2nd. 18, (Tex. Civ. App., 1966, Ref. N.R.E.)	3
Texas v. New Jersey et al, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed. 2nd. 596 (1965)	2, 3, 4, 5, 8, 9

STATUTES

General Statutes of Connecticut, Sec. 3-56a et seq.	6
General Laws of Rhode Island, Sec. 33-20-1 et seq.	6, 7
New Jersey Statutes, Sec. 2A: 37-1 et seq.	7
General Statutes of Arkansas, Sec. 50-601 et seq.	7
84 Oklahoma Statutes, Sec. 271 et seq.	7
Illinois Revised Statutes, Chap. 141, Sec. 101 et seq.	7
California Code of Civil Procedure, Chap. 7, Sec. 1501 et seq.	7, 8
Arizona Revised Statutes, Chap. 3.1, Sec. 44-351 et seq.	8
Kentucky Revised Statutes, Chap. 393, Sec. 393.010 et seq.	8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No._____

STATE OF TEXAS,

Petitioner

v.

CENTRAL POWER AND LIGHT COMPANY,

Respondent

—o—

RESPONDENT'S REPLY BRIEF TO THE PETITION OF THE STATE OF TEXAS FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondent, Central Power and Light Company, a corporation organized and existing under and by virtue of the laws of the State of Texas, files this its Reply Brief to the Petition of the State of Texas for Writ of Certiorari to the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas, and would herein show the Court that the judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas is in all things correct and that Petitioner's Application for Writ of Certiorari should be denied.

RESTATEMENT OF QUESTION PRESENTED

The Respondent is a public utility corporation organized and existing under the laws of the State of Texas and does no business outside of the boundaries of

the State of Texas. The Respondent corporation owes a total of $462.06 in unclaimed dividend payments to certain record owners of its stock whose last known addresses, according to Respondent's books and records, are in states other than the State of Texas. The Respondent corporation does not hold unclaimed dividends payable or trust funds created for the purpose of discharging dividend indebtedness. The Respondent corporation merely owns general assets in the State of Texas out of which assets claims against it, such as dividend indebtednesses, may be satisfied. In view of these facts, the question to be decided by this Court is:

May Petitioner, under its escheat laws, cause Respondent to pay over to the Treasurer of the State of Texas a portion of its general assets regardless of the fact that this Court's decision in *Texas vs. New Jersey*, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed. 2d 596 (1965), states that the situs of the property subject to escheat is in a state other than the State of Texas.

RESTATEMENT OF THE CASE

Over a period of a number of years, Respondent has been unable to tender payment of dividends on its preferred stock to some of its preferred shareholders for the reason that their whereabouts are unknown. Some of these creditors' addresses, as shown by Respondent's books and records, are in states other than the State of Texas. Petitioner has sought to escheat an amount of Respondent's general assets equal to the amount of dividend payments owed by Respondent to these various preferred stockholders whose last known addresses are outside of the State of Texas. Respondent successfully defended against Petitioner's action in both the Texas Court of Civil Appeals and the Texas Supreme Court. The escheat laws of these states of last known address were before both of these Texas appellate courts, and were construed to effectively escheat the property involved. Respondent's defense was based upon this Court's holding in *Texas vs. New Jersey*, supra, that it was the intangible personal property, the debt, claim, or chose in action, which is es-

cheatable, and that the situs of that intangible personal property is in the state of last known address of the creditor according to debtor's books and records. The case as finally reported below and upon which this Petition for Writ of Certiorari is predicated is *Central Power and Light Company vs. State of Texas*, 410 S.W. 2d 18 (Tex. Civ. App., 1966, Ref., N.R.E.)

ARGUMENT AND AUTHORITIES

Petitioner's Application for Writ of Certiorari presents a question which was answered by a decision of this Court within the last three years. In *Texas vs. New Jersey et al*, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed. 2d 596; final decree in 380 U.S. 518, 85 S.Ct. 1136, 14 L.Ed. 2d 49, Petitioner advanced the identical arguments and this Court held:

1. That intangible personal property, such as debts, unclaimed dividends payable or undelivered stock certificates resulting from stock dividends (See Footnote 4 [2] [a] at page 675 of 379 U.S.) is an asset of the creditor.

2. That under the concept of "mobilia sequuntur personam", the asset has its situs in the state of last known address of the creditor as shown by the debtor's books and records.

3. That if such state of last known address has an applicable escheat law, then that state alone is entitled to escheat the asset.

Respondent is indebted to certain of its stockholders of record for dividends due them which have remained unclaimed for a period of more than seven years. The last known addresses of these creditors are in states other than Texas. The total amount of these unclaimed dividends is $462.06.

The concept announced in Texas vs. New Jersey et al, supra, as applied to the instant case is simply, but adequately, stated as follows:

1. Creditors of Respondent hold debts, obligations

or choses in action against Respondent. These items are assets of the creditors.

2. Under the concept of "mobilia sequuntur personam," the situses of these assets are in the states of last known addresses of the creditors, as reflected in Respondent's books and records.

3. The states of last known address are entitled to escheat these assets, providing such states have applicable escheat laws.

This Court, in *Texas vs. New Jersey et al*, continually stresses the fact that it is the intangible personal property, the debt or chose in action, itself, which is subject to escheat; not a collected debt or assets of a debtor which may be available to satisfy the obligation. In fact, this Court, at page 680 of 379 U.S., states, " . . . . These debts owed by Sun are not property to it, but rather the liability, and it would be strange to convert a liability into an asset when the State decides to escheat." Further, in adopting the rule advanced by Florida, this Court said, at pages 680-681 of 379 U.S., " . . . . That since a debt is property of the creditor, not of the debtor, fairness among the states requires that the right and power to escheat the debt should be accorded to the state of the creditor's last known address as shown by the debtor's books and records."

In view of the clear and unequivocal language of the Court, it is not open to question that the property subject to escheat is the debt or chose in action itself, not funds available from debtor's general assets. Petitioner failed to recognize this distinction and argues that it is entitled to escheat from the general assets of Respondent because it has exclusive personal jurisdiction over Respondent and its assets, and that none of the states of the creditors' last known addresses have such jurisdiction. The obvious answer to Petitioner is that the decision in *Texas vs. New Jersey et al*, supra, does not concern itself, in the least, with which state has jurisdiction over the debtor. The whole thrust of *Texas vs. New Jersey et al* is directed toward juris-

diction over the debt or chose in action, which is the asset to be escheated. Jurisdiction over the debtor is immaterial. *Texas vs. New Jersey et al* cannot be intelligently interpreted otherwise.

That this Court has recently passed on this identical question is pointedly revealed by calling the Court's attention to a motion of Petitioner in *Texas vs. New Jersey et al* to modify and clarify that opinion. This motion is on file with this Court and is part of the record in that case. Said motion was denied on June 1, 1965, by a Memorandum Opinion reported in 381 U.S. 931, 85 S.Ct. 1762, 14 L.Ed. 2d 698.

In substance, that motion asked this Court to limit the application of *Texas vs. New Jersey* to instances in which the state of last known address has personal jurisdiction over the debtor. In support of its motion, Petitioner urged that "Numerous corporations chartered under Texas laws are presently contending that the opinion of the Court in this case prevents the State of Texas from escheating funds held or owed by them to persons whose last known addresses are outside Texas regardless of the fact that such corporations neither do business nor are authorized to do business in the state of last known address."

The argument now advanced by Petitioner is the identical argument, part and parcel, that was submitted to this Court in *Texas vs. New Jersey*. Respondent submits that *Texas vs. New Jersey* adequately answers this issue and controls the instant case.

The only legitimate issue raised by Petitioner's Application for Writ of Certiorari is: Whether or not the laws of the states of last known address provide for the escheat of the subject intangible personal property having its situs in those states.

According to Respondent's books and records, the last known addresses of the out-of-state creditors owning claims against Respondent are in Arizona, California, Connecticut, Kentucky, Oklahoma, Illinois, New

Jersey, Arkansas and Rhode Island. Petitioner has quoted excerpts of the escheat laws of these states in Appendix C of its Petition, and argues that under the quoted provisions, those states cannot escheat the intangible personal property located in those states. Respondent agrees. However, Respondent would show the Court that other provisions of the same statutes, not included in Petitioner's Application for Writ of Certiorari, will effectively escheat such property.

Connecticut's escheat statutes are found in the General Statutes of Connecticut, Sec. 3-56a et seq. Sec. 3-56a includes the definition of property, to wit, "Property means realty or personalty, tangible or intangible." A debt or chose in action owned by a creditor within Connecticut is certainly intangible, personal property falling within the scope of this section. Sec. 3-54a states that property held in Connecticut and remaining unclaimed for more than seven years is presumed abandoned. Sec. 3-72a provides the procedures whereby the State of Connecticut finally escheats such abandoned property. Contrary to Petitioner's argument, Sec. 3-59a pertains only to businesses organized under Connecticut's laws or authorized to do business in Connecticut, neither of which affects Respondent. Sec. 3-59a applies to funds or general assets of of these Connecticut business entities, whereas, in the instant case, we are not concerned with funds located in Connecticut, but intangible personal property in the form of a debt or chose in action which is located in Connecticut and is subject to being escheated by that state.

Rhode Island's escheat laws are found in the General Laws of Rhode Island, Sec. 33-20-1 et seq. Sec. 33-21-11 defines personal property as "choses in action . . . and every other kind of tangible or intangible personal property". Sec. 33-21-13 states, "Whenever the whereabouts of the owner . . . . or person entitled to any property within this state has been or shall remain unknown for seven years . . . such personal property shall escheat to the state . . . ". Obviously, Rhode Island's laws will effectively escheat intangible, personal

property, such as a chose in action, which has its situs in the State of Rhode Island.

New Jersey's escheat statutes are found in Title 2A, New Jersey Statutes, Sec. 2A: 37-1 et seq. Section 2A: 37-11 defines personal property as choses in action, interest, debts, . . . stocks, bonds, . . . and every other kind of tangible and intangible personal property . . .". Section 2A: 37-13 states that personal property within the State of New Jersey which has remained unclaimed for fourteen years will escheat to the state.

Arkansas's escheat laws are found in the General Statutes of Arkansas, Sec. 50-601 et seq. Section 50-603 defines personal property as all tangible and intangible property. Section 50-604 provides that all personal property located in Arkansas and unclaimed for seven years is abandoned and is subject to escheat.

The pertinent Oklahoma statutes appear in 84 Oklahoma Statutes, Sec. 271 et seq. Section 271 provides that if the owner of any personal property is absent or unknown for seven years, then the property will be escheated to and vest in the state.

Illinois's escheat laws appear in Illinois Revised Statutes, Chapter 131, Sec. 101 et seq. Section 109 states that property not otherwise covered by the Act, including all intangible, personal property which is held in Illinois and unclaimed for 15 years is presumed abandoned. All other sections deal only with property owed by debtors organized under the laws of Illinois or who are authorized to do business in Illinois; hence, Section 109 is the section applicable to the type of personal property involved in the instant case.

California. California's escheat laws appear in the California Code of Civil Procedure, Chapter 7, Sec. 1500 et seq. Section 1508 provides that all intangible, personal property, except classes of property mentioned in Sec. 1502 through 1507, held in California and unclaimed are presumed to be abandoned. Sections 1502 through 1507 are concerned with funds or other per-

sonal property which are held by business entities either organized under the laws of California or authorized to do business in that state. Respondent does no business in California; hence, the personal property involved herein is included in Sec. 1508.

Arizona's escheat laws are found in the Arizona Revised Statutes, Chapter 3.1, Sec. 44-351 et seq. Section 44-359 provides that all personal property, tangible or intangible, not otherwise covered, held in Arizona and unclaimed for seven years is abandoned. The intangible personal property involved herein is not covered by any other provision of the Arizona Escheat Law; hence, is included within Sec. 44-359.

Kentucky's escheat laws are found in the Kentucky Revised Statutes, Chapter 393, Sec. 393.010 et seq. Section 393.050 provides that all property owned by persons unknown or absent for seven years shall escheat. This includes intangible personal property such as a debt or chose in action owned by a citizen of Kentucky. Section 393.064 is not applicable because it deals only with property held or owing by a business entity organized in Kentucky or authorized to do business in that state.

Quite predictably, there are no published cases construing any of the statutes under consideration. It is noteworthy, however, to point out that both the Texas Court of Civil Appeals and the Texas Supreme Court construed these statutes in the manner advocated by Respondent. Further, Respondent would be reluctant to believe that the Attorneys General of these nine states would agree with Petitioners interpretation of such statutes, thereby precluding their respective states from escheating these properties located within their boundaries. Respondent would once again call the Court's attention to the fact that it has already defined a chose in action, such as a claim for unpaid dividends, as a specie of intangible, personal property to be considered as an asset of the creditor having its situs in the state of residence of the creditor as reflected by debtor's books and records. (*Texas vs. New Jer-*

sey et al, Footnote 4, page 675, 379 U.S.). This being the case, the inescapable conclusion follows that the situs of each of these items of intangible personal property is in the state of the creditor's last known address as reflected by Respondent's books and records; that each of these nine states has an applicable escheat law thereby becoming entitled to escheat such property; and Petitioner is neither entitled to escheat any of these items of personal property nor to escheat any of the general assets held by Respondent in Texas.

CONCLUSION

The decision of the Texas Court of Civil Appeals and the approval of that decision by the Texas Supreme Court are in complete accord with *Texas vs. New Jersey et al* and are in all things correct. Petitioner's Application for Writ of Certiorari should be denied.

Respectfully submitted,

H. K. HOWARD
PHILLIP MCCONNELL

Attorneys for Respondent
120 North Chaparral Street
Corpus Christi, Texas

CERTIFICATE OF SERVICE

I, H. K. Howard, one of the attorneys for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____day of _____, 1967, I served a copy of the foregoing Answer to Petitioner's Application for Writ of Certiorari on Petitioner, the State of Texas, by depositing a copy in the United States Mail as certified mail with postage prepaid and addressed to the Attorney of Record for Petitioner, as follows: Mr. W. O. Shultz II, Assistant Attorney General, Box R, Capitol Station, Austin, Texas 78711.

UPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 3 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 551

STATE OF TEXAS,

Petitioner,

vs.

CENTRAL POWER & LIGHT COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

ARTHUR J. SILLS,
Attorney General of New Jersey,
Amicus Curiae,
State House Annex,
Trenton, New Jersey.

ALAN B. HANDLER,
First Assistant Attorney General,
and
ELIAS ABELSON,
Deputy Attorney General,
Of Counsel.

WILLIAM J. WALSH,
Deputy Attorney General,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
ARGUMENT:	
Point I—The decision of the Texas Court of Civil Appeals concluding that Texas v. New Jersey, 379 U. S. 674 (1965) extinguished the power of a state of corporate domicile to take from the holder corporation unclaimed intangibles payable to persons whose last known addresses were in states which do not have in personam jurisdiction over the corporation, constituted an unwarranted extension of the rule established therein by the Supreme Court of the United States	6
Point II—The interpretation and application of the rule of Texas to the case sub judice by the Texas Court of Civil Appeals permits the defendant to retain the beneficial use of unclaimed funds contrary to the recognized purposes of custodial escheat	11

PAGE

Point III—The several academic and judicial readings of Texas v. New Jersey demonstrate the confusion generated by that decision and the need for this Court to speak to its jurisdictional scope 12

CONCLUSION 16

APPENDIX:

New Jersey Statutes Annotated, Section 2A:37-30 17

Cases Cited

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937) 8

Georgia v. Chattanooga, 264 U. S. 472 (1924) 8

Hanson v. Denckla, 357 U. S. 235 (1958) 10

International Shoe Company v. State of Washington, 326 U. S. 310 (1945) 10, 12

Massachusetts v. Missouri, 308 U. S. 1 (1939) 8

McGee v. International Life Ins. Co., 355 U. S. 220 (1957) 10, 12

Standard Oil Co. v. New Jersey, 341 U. S. 428 (1951) 7, 11, 12

State of New Jersey v. Amsted Industries, 48 N. J. 544, 226 A. 2d 715 (1967) 14, 16

State of New York v. State of New Jersey, 358 U. S. 924 (1959) 6

Texas v. New Jersey, et al., 379 U. S. 674 (1965) .. 2, 4fn, 5, 6, 8, 9, 11, 12, 14-16

Western Union Tel. Co. v. Pennsylvania, 368 U. S. 71 (1961) 7, 8

PAGE

Statutes Cited

Escheat Law 2

N.J.P.L. 1967, Ch. 135 ..... 4fn

N.J.S. 2A:37-30 ..... 4fn

Texas Civil Statutes (Vernon, 1962 Supplement):

Art. 3272a 3

28 U.S.C.:

Sec. 1257(3) 2

Other Authorities Cited

3 Harv. J. Legis. (1965):

pp. 135, 163, 186 13

Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe, 47 Geo. L. J. (1958):

342, 351 10

Note, 65 Colum. L. Rev. (1965):

1101, 1104 14

60 Nw. U. L. Rev. (1965):

550, 557 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 551

STATE OF TEXAS,

Petitioner,

v.

CENTRAL POWER & LIGHT COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Attorney General of the State of New Jersey on behalf of the State of New Jersey, *amicus curiae*, submits the within brief in support of the prayer of the State of Texas that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas, entered in the above case on September 29, 1966. At least one of the creditors of Central Power & Light Company whose intangible property is the subject of an escheat in the instant matter shows a last known address in the State of New Jersey.

Opinions Below

The opinion of the Court of Civil Appeals for the Thirteenth Supreme Judicial District entered September 29, 1966, is reported at 410 S. W. 2d 18 (1966). The findings of fact and conclusions of law of the District Court of Nueces County, Texas, are unreported and are printed in Appendix B to the brief of the State of Texas (Pb32 to Pb34).

Jurisdiction

The Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas entered judgment in this case on September 29, 1966. The Supreme Court of Texas, by order dated May 10, 1967, refused petitioner's application for writ of error to review the judgment below. Petitioner's motion for rehearing of its application for writ of error was overruled on June 7, 1967.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Where a corporation holds unclaimed monies payable to persons whose last known addresses are in states which do not have jurisdiction over the corporation or the *res*, and said corporation is not formally qualified to do business in said states and there is nothing in the record showing that the corporation is otherwise subject to service of process in said states, did *Texas* v. *New Jersey, et al.*, 379 U. S. 674 (1965) extinguish the power of the state of corporate domicile to take custody of these funds under its escheat law?

Statutes Involved

The relevant statutes involved in the instant matter are set forth in Appendix C to the brief of petitioner, State of Texas (Pb36 to Pb41).

Statement of the Case

This action originated on March 28, 1964, when petitioner filed its plaintiff's original petition in the 94th District Court of Nueces County, Texas, asking that certain personal property held by respondent be declared escheated under the provisions of Article 3272a, Texas Civil Statutes (Vernon, 1962 Supplement). The property involved included unclaimed dividends held by the respondent corporation for certain of its shareholders whose last known addresses were, according to the corporate books and records, in states other than the State of Texas. It is undisputed that the respondent, a corporation chartered under the laws of the State of Texas, does not transact business outside the State of Texas nor does it hold a certificate of authority to transact business in any other state (Trial Court Finding of Fact No. 4, Pb33-6 to 16).

On September 10, 1965, the District Court entered its judgment decreeing the escheat of personal property held by respondent, including the dividends held for persons with last known addresses in states other than Texas. The District Court's finding of fact No. 4 and conclusions of law Nos. 5, 6, and 7 supported the judgment of escheat of such dividends and showed that court's agreement with petitioner's contentions. Such finding and conclusions read as follows:

> "4. I find that Central Power & Light Company is a corporation chartered under the laws of the State of Texas and that such company does not transact any business in any other state nor has it been granted permission to transact business in any other state nor has it been granted permission to transact business in any other state." (Pb33-6 to 16)
>
> "5. I conclude that the laws of the states which are shown to be the states of last known address of per-

sons for whom dividends payable on the 7%, 6%, and 4% Preferred Stock of Central Power & Light Company are held make no provision for the escheat of such dividends.*

6. I conclude that no other state has in personam jurisdiction of Central Power & Light Company and in the absence of such personal jurisdiction no other state has the power to escheat property held by Central Power & Light Company even though the last known address of the person entitled thereto may be within such other state.

7. I conclude that personal jurisdiction over the holder of personal property is essential to the power of a state to escheat property under its laws." (Pb34-7 to 22)

---

* It must here be noted that on June 28, 1967 N.J.P.L. 1967, Chapter 135 was approved by the Governor of New Jersey and took effect on that date. In pertinent part, this enactment amended N.J.S. 2A:37-30, the New Jersey Statute upon which the trial's court conclusion of the law No. 5 was made. The old law is set out in Appendix C to petitioner's brief (Pb40 to Pb41). The pertinent portion of the 1967 amendment may be found in Appendix A to the brief of the State of New Jersey. The applicable significance of this change to the New Jersey law is that it permits escheat of unclaimed dividends held by a foreign corporation ". . . subject to the laws of this State . . ." where the foreign corporation is a holder of such dividends payable by it to a person whose last known address, according to the records of the holder, is within New Jersey.

The amendment of 1967 permits New Jersey, as a state of last known address, to pursue in theory its custodial escheat procedure against the corporate holder. Nevertheless, New Jersey takes the position that despite the satisfaction of the statutory prerequisite under the rule of *Texas* v. *New Jersey*, this State is barred from commencing such an action if there exists a lack of *in personam* jurisdiction over the corporate holder.

The respondent's exception and notice of appeal were included in the judgment of the District Court. Respondent specifically excepted to the above quoted conclusions of the District Court by means of its Defendant's Bill of Exception No. 1 which was duly approved by the District Court. The question was presented on appeal to the Court of Civil Appeals by respondent's Second Point of Error before that court (410 S. W. 2d 18, 20).

The Court of Civil Appeals, acting solely on the authority of this Court's decision in *Texas* v. *New Jersey*, held that the District Court erred in its conclusions and rendered judgment decreeing that the dividends in question were not subject to escheat by the State of Texas (410 S. W. 2d 18, 26-27). Petitioner's hearing was timely filed in the Court of Civil Appeals and subsequently overruled by that court.

The question was presented to the Supreme Court of Texas by petitioner's Application for Writ of Error to review the judgment of the Court of Civil Appeals. The Supreme Court of Texas, by order entered on May 10, 1967, ordered that said application be refused. Petitioner's motion for rehearing of its application for writ of error was overruled on June 7, 1967.

Reasons for Granting the Writ

1. The decision of the Texas Court of Civil Appeals constitutes an unwarranted extension of the rule in *Texas* v. *New Jersey* and subverts the conceptions of this Court intended to ease and strengthen the administration of multistate escheats.

2. The decision of the Texas Court of Civil Appeals permits a corporate holder to retain the beneficial use of unclaimed funds until forced to pay such funds to a state of last known address. Such retention in private custody thwarts the recognized purposes of custodial escheat.

ARGUMENT

POINT I

The decision of the Texas Court of Civil Appeals concluding that *Texas* v. *New Jersey*, 379 U. S. 674 (1965) extinguished the power of a state of corporate domicile to take from the holder corporation unclaimed intangibles payable to persons whose last known addresses were in states which do not have *in personam* jurisdiction over the corporation, constituted an unwarranted extension of the rule established therein by the Supreme Court of the United States.

Texas v. *New Jersey, et al.*, 379 U. S. 674 (1965), final decree, 380 U. S. 518 (1965), motion for clarification and modification of opinion denied, 381 U. S. 931 (1965), motion for modification of decree denied, 381 U. S. 948 (1965), came before this Court for decision in 1965. The case was a natural progression from earlier decisions which recognized that some day the Court would have to deal with the conflicting claims of two or more states for the same unclaimed intangibles.

This apparently inevitable contest, was postponed when the Court had before it in 1959 an application by the State of New York for leave to file an original action against New Jersey alleging a controversy between the two states for unclaimed monies payable on travelers checks issued by American Express Company, a joint stock company organized under New York law and having its principal office in New York. When New Jersey answered and pointed out that New York's law did not cover these monies and that no justicable controversy in the constitutional sense existed between the states, the Court refused jurisdiction. *State of New York* v. *State of New Jersey*, 358 U. S. 924 (1959).

In *Western Union Tel. Co.* v. *Pennsylvania,* 368 U. S. 71 (1961) the Court had before it the conflicting claims of Pennsylvania and New York for unclaimed funds deposited in offices of Western Union Telegraph Company located in Pennsylvania for transmittal to points outside and within Pennsylvania. Western Union was a New York corporation doing business in Pennsylvania. The Pennsylvania Supreme Court sustained the power of Pennsylvania to escheat these unclaimed funds. 400 Pa. 337, 162 A. 2d 617 (1960). On appeal, this Court reversed, holding that there was an active controversy between New York and Pennsylvania for the same funds, and the question would have to be determined in a court with jurisdiction over both states, that is to say, the United States Supreme Court.

At this point in the historical development of the law of escheat it was clear that the state of corporate domicile had the power to take unclaimed intangibles from its corporations if there was no active controversy with another state asserting a claim for the same property. The judgment in favor of the domicile state barred any double escheat under the Full Faith and Credit clause of the United States Constitution, and any other state which later asserted a claim for the same intangible had to enforce its claim against the domicile state. *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428 (1951).

It is the active controversy between two states which gives rise to a justicable controversy within the limits of the exercise of the original jurisdiction of the United States Supreme Court. If the corporate holder is not amenable to process in the address state, then no active or justicable controversy exists between these states. It would amount, at most, to a difference or dispute of a hy-

pothetical or abstract character. Where there is no justiciable controversy in the constitutional sense, the United States Supreme Court will not exercise its power of original jurisdiction. *Georgia* v. *Chattanooga*, 264 U. S. 472 (1924); *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939); *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937).

It was after *Western Union* that *Texas* v. *New Jersey*, 379 U. S. 674 (1965) came before the Court for decision. The State of Texas commenced an original action in the United States Supreme Court against New Jersey, Pennsylvania and Sun Oil Company, a New Jersey corporation authorized to do business in all states of the United States. Texas claimed a superior right to escheat unclaimed intangibles payable by Sun on the grounds that all of the "contacts" relative to these intangibles were in Texas. New Jersey contended that it had the superior right to escheat these claims on the grounds that Sun was organized and existed under its laws and was domiciled in the State of New Jersey. Pennsylvania claimed a superior right to escheat the intangibles on the ground that the principal executive office of Sun was in the State of Pennsylvania. The State of Florida intervened and claimed a superior right to escheat some of the intangibles involved which were payable to persons whose last known addresses on the corporate records of Sun were in Florida. We emphasize that Sun, the corporation defendant was authorized to do business in all of the claiming states and, accordingly, subject to service of process in such states. The holding in *Texas* that the state of last known address had the superior right to escheat where there was an active controversy between two or more states for the same unclaimed intangible property was a decision applicable solely to the factual situation there presented.

Equally important to the holding in Texas is what was not said. This Court in *Texas* held only that a state of last known address with an escheat law and with the necessary prerequisite of *in personam* jurisdiction over the corporate holder had a prior right to escheat vis-a-vis the domicile state. This Court did not hold that the state of domicile could not escheat unclaimed property as against a state of last known address which did not have an escheat law *enforceable* against the defendant corporation.

A conclusive indication that this Court did not intend to establish any novel jurisdictional rule in *Texas* is indicated by the statement at page 678 of 379 U. S.:

> ". . . The issue before us is not whether a defendant has had sufficient contact with a State to make him or his property rights subject to the jurisdiction of its courts, a jurisdiction which need not be exclusive. Compare *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Mullane* v. *Central Hanover Bank & Trust Co., supra; International Shoe Co.* v. *Washington,* 326 U. S. 310 . . . ."

With this as prelude, it may be seen that the Texas Court of Civil Appeals by its construction of *Texas* in the case *sub judice* has necessarily implied a drastic change in traditional concepts of jurisdiction and jurisdictional power. It has ruled, in effect, that the mere existence of a corporate creditor's last known address in a non-domicile state having an escheat law creates sufficient "contact" with the address state to preclude escheat by a state of corporate domicile. Such a result should not be lightly implied.

The "certain minimum contacts" jurisdictional rule which permits maintenance of a suit against a nonresident corporation and does not offend "traditional notions of

fair play" emanates in large measure from *International Shoe Company* v. *State of Washington*, 326 U. S. 310 (1945); *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957); and *Hanson* v. *Denckla*, 357 U. S. 235 (1958).

The standards of this rule are summarized in *Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 Geo. L. J. 342, 351 (1958) as follows:

> "(1) The nonresident defendant must do some act or consummate some transaction within the forum. It is not necessary that defendant's agent be physically within the forum, for this act or transaction may be by mail only. A single event will suffice if its effects within the state are substantial enough to qualify under Rule Three.
>
> (2) The cause of action must be one which arises out of, or results from, the activities of the defendant within the forum. It is conceivable that the actual cause of action might come to fruition in another state, but because of the activities of defendant in the forum state there would still be a 'substantial minimum contact.'
>
> (3) Having established by Rules One and Two a minimum contact between the defendant and the state, the assumption of jurisdiction based upon such contact must be consonant with the due process tenets of 'fair play' and 'substantial justice.' If this test is fulfilled, there exists a 'substantial minimum contact' between the forum and the defendant. The reasonableness of subjecting the defendant to jurisdiction under this rule is frequently tested by standards analogous to those of *forum non conveniens*."

By permitting an address state to extend its jurisdictional reach upon the facts herein set forth, the Texas Court of Civil Appeals has in a single stroke subverted the "minimum contacts" doctrine, and muddled multi-state escheat law.

POINT II

The interpretation and application of the rule of *Texas* to the case *sub judice* by the Texas Court of Civil Appeals permits the defendant to retain the beneficial use of unclaimed funds contrary to the recognized purposes of custodial escheat.

Nowhere in *Texas* is there any authority indicating that the power of a domicile state to take unclaimed funds from its corporations, subject to the right of another state to make a claim against the domicile state, was being extinguished. This basic power was established in *Standard Oil.* This Court in *Texas* did not adopt a new rule permitting the corporate holder to retain the beneficial use of unclaimed funds to which it has no moral or legal claim, to be applied where a corporation holds unclaimed funds payable to a person whose last known address was in a state with an escheat law, but where the corporation is not qualified to do business or otherwise amenable to process.

The result in *Texas* was reached upon the fundamental question of ease of administration and equity. 379 U. S. at page 683. To construe *Texas* as holding that corporations may now retain the beneficial use of unclaimed funds to which they had no moral or legal right before *Texas,* would be unjust, inequitable and create complicated problems of administration.

The attitude of the United States Supreme Court on allowing would be possessors to seize unclaimed personal property in their own possession is indicated in *Standard Oil* where the Court stated at page 435 of 341 U. S.:

> "As a broad principle of jurisprudence rather than as a result of the evolution of legal rules, it is clear that a state, subject to constitutional limitations, may use its legislative power to dispose of property within its reach, belonging to unknown persons. Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations."

If a corporate holder is not qualified to do business in the State of last known address and it does not show that it is otherwise subject to service of process in such state, the state of corporate domicile should be permitted to take the unclaimed funds from the corporation.

POINT III

The several academic and judicial readings of *Texas* v. *New Jersey* demonstrate the confusion generated by that decision and the need for this Court to speak to its jurisdictional scope.

Following the decision in *Texas* much speculation was engendered concerning the import and scope of the rule therein set forth. Particularly, inquiry centered on whether *Texas* eroded the traditional "contacts" tests for *in personam* jurisdiction developed through *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) and *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957).

In considering a proposed State statute for the disposition of unclaimed property, 3 *Harv. J. Legis.*, 135 (1965) the author comments, beginning at page 163:

> "Because *Texas* v. *New Jersey* eliminated any need for the escheating state to have jurisdiction over the holder, the language in the definitions previously making such jurisdiction a prerequisite to action under this act has been deleted from the definitions of 'banking organization,' 'financial organization,' 'life insurance corporation,' 'utility,' and all sections of the act which had a 'contacts' requirement. Rather than adopt the 'contacts' rule, which the Supreme Court felt would leave in permanent turmoil a question which should be settled once and for all, the Court decided to delineate a clear rule which would 'govern all types of intangible obligations like these.' *Texas* v. *New Jersey, supra,* at 678. Accordingly, now even in the absence of traditional 'contacts' between the state and the holder, the state can escheat property owed to a person whose last known address, as shown on the books of the holder, is in this state. . . ."

At page 186 of 3 *Harv. J. Legis.* the comment of the author proceeds as follows:

> "* * * But the 'contacts' with the holder necessary to have the right to escheat the property under *Texas* v. *New Jersey* (which are apparently none—see section 102), and the 'contacts' necessary to have jurisdiction over the holder in one's own state courts would seem to be two different standards. It would seem that the traditional 'contracts' [sic] tests retain their validity when thinking in terms of suing a non-resident holder in one's own state courts.

> Thus subsection (b) enumerates the conditions under which states have been held to have such traditionally sufficient 'contacts' as to sustain a suit. It is conceivable, of course, that an entirely new 'contacts' test would be approved for suing non-resident holders in one's own state courts. If the mere fact that the owner's last known address was in this state is accepted as sufficient 'contact' with the holder so that this state can get jurisdiction in its courts over a holder on that basis alone, then *all* escheat proceedings could be in the courts of the escheating state, and the remaining subsections of section 602 would be unnecessary. But if such a jurisdictional rule were accepted, it would seem that it would have to be restricted to the sphere of escheat proceedings, for the prospect of the application of such a jurisdictional rule to other areas of the law can be alarming."

The foregoing conclusions demonstrate the confusion resulting from readings of the *Texas* rule; confusion now compounded by the Texas Court of Civil Appeals. The converse lack of jurisdictional extension has been recognized by various other authorities. Note, 65 *Colum. L. Rev.* 1101, 1104 (1965); 60 *Nw. U. L. Rev.* 550, 557 (1965).

In 1967, the Supreme Court of New Jersey decided *State of New Jersey* v. *Amsted Industries*, 48 N. J. 544, 226 A. 2d 715 (1967). This was an appeal from that part of a judgment entered by the Superior Court of New Jersey, Chancery Division in favor of defendant, Amsted Industries, a New Jersey corporation, and against plaintiff, State of New Jersey, which held that unclaimed funds in the custody or possession of defendant payable to persons whose last known addresses on the defendant's records

were in the States of Florida, Kentucky, Massachusetts, New York and Virginia, States which have in effect an unclaimed personal property law and in which defendant is not formally qualified to do business, were not subject to taking by the State of New Jersey under the holding in *Texas* v. *New Jersey*.

In affirming, the New Jersey Supreme Court said in part:

> "We find nothing in the Supreme Court's opinion in *Texas* which lends any support to New Jersey's contention that the creditor's state supplants the state of incorporation only if the defendant has been authorized to do business there. Nor do we find any reason in policy or otherwise for such restriction. Under *Texas* the creditor's state now has the paramount interest and other states should do what they can to honor it. See 65 *Colum. L. Rev.* 1101, 1104 (1965). The mere fact that the defendant has not formally qualified to do business in the states in question does not necessarily mean that it is immune from their jurisdiction and service of process. Its actual activities within those states may well bring it within the currently expanding concepts and exercises of jurisdictional power. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 90 L. Ed. 95 (1945); *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 2 L. Ed. 2d 223 (1957); *cf. J. W. Sparks & Co.* v. *Gallos*, 47 N. J. 295 (1966). If we were to undertake to determine, in this escheat proceeding, the extent and jurisdictional effect of the defendant's actual activities in those states, we would indeed go a long way towards defeating the very simplicity and ease of administration sought by the Supreme Court in *Texas*." 48 N. J. at 548, 226 A. 2d at 717, 718.

Whether the New Jersey Supreme Court has properly construed *Texas* v. *New Jersey* is not at issue here. *Amsted* appears to invite state action upon the merest corporate caress by disregarding the absence of known "contact" with a creditor's state.

The case at bar, while similar, is not perfectly encompassed by *Amsted*. The Texas trial court found as fact that the holder corporation had not qualified to do business in any state other than Texas, *and did not transact business outside that State* (Pb33-6 to 16). Thus, there is lessened to the point of virtual nullity the possibility of jurisdictional contact through actual corporate activity bottoming *Amsted*. Unless corrected, this Court's decision in *Texas* will continue to be construed as an extension of the "contacts" doctrine. That this is not so must be made clear.

CONCLUSION

For the reasons discussed herein, it is respectfully urged that certiorari should issue to review the decision of the court below.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,
Amicus Curiae.

ALAN B. HANDLER,
First Assistant Attorney General,
and
ELIAS ABELSON,
Deputy Attorney General,
Of Counsel.

WILLIAM J. WALSH,
Deputy Attorney General,
On the Brief.

APPENDIX

New Jersey Statutes Annotated, Section 2A:37-30

(a) Except as may be otherwise provided by subsections (b) and (c) of this section, whenever a corporation, partnership, limited partnership or other business association incorporated or organized under the laws of this State or whenever any natural person doing business and domiciled in this State shall have custody or possession of, or otherwise be the holder of, or shall have deposited with or given to an agent or trustee residing within or without of this State custody or possession of, stock dividends or any moneys and other accretions which are or shall be due or payable to any person as a dividend upon capital stock, preferred or common, or as interest payable upon bonds, indentures, notes or other formal instruments evidencing indebtedness or any moneys payable as wages to any person, or any moneys payable on other general cash obligations, and except as may be otherwise provided by subsections (b) and (c) of this section, whenever any corporation, partnership, limited partnership or other business associations incorporated or organized under the laws of any other State or of the United States or whenever any natural person doing business within or without this State, and subject to the laws of this State shall have custody or possession or otherwise be a holder of any moneys or other personal property which are due or payable by such holder to any person in any of the categories above enumerated whose last known address according to the records of the holder is within this State and the owner of, beneficial owner of, or person entitled to the same has been and remains unknown for *a* period of 5 successive years, or the whereabouts of such person has been and remains

unknown for a period of 5 successive years, or such person property has been and remains unclaimed for a period of 5 successive years, such moneys or other personal property shall be presumed abandoned and subject to delivery to the State Treasurer for safekeeping.